

October 11, 2001

To: MEQB Members

From: Alan Mitchell (Phone: 651-296-3714)  
Manager, Power Plant Siting Program

Subject: Adoption of Draft Rules as Interim Guidance for Processing Permit  
Applications for Large Electric Power Generating Plants and High  
Voltage Transmission Lines

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**Background.** In May 2001, the Minnesota Legislature passed the Energy Security and Reliability Act of 2001. Minnesota Session Laws 2001, chapter 212. This Act substantially changed the power plant siting process in this state, and the staff has advised the Board about these changes at past Board meetings. The new law went into effect on August 1, 2001.

Because of the changes in the power plant siting process, the existing EQB rules applicable to power plant siting and transmission line routing now have to be amended. The existing rules are found in Minnesota Rules chapter 4400. At the August 2001 Board meeting the staff presented to the Board draft amendments to the power plant siting rules.

On September 10, 2001, the EQB published notice in the State Register that the Board was intending to amend the power plant siting rules and interested persons were invited to submit comments on the Board's intention to amend the rules. The draft rules were referenced in the notice and are available for review on the EQB webpage. The public has until December 7, 2001, to submit comments to the EQB regarding the intention to promulgate amendments to the power plant siting rules. Once the comment period ends the staff will revise the draft rules, prepare a Statement of Need and Reasonableness explaining the proposed amendments, and present the package to the Board for initiation of the formal rulemaking process. It is likely to take until next summer, or later if a public hearing is requested, to complete the rulemaking process and adopt final rules.

In the meantime, the EQB is likely to receive several permit applications for new power plants and transmission lines. Rapids Power LLC has already submitted an application for a certificate of need to the Public Utilities Commission for a 225 megawatt cogeneration facility in Grand Rapids. The company has indicated that a site permit application could be submitted to the EQB in November. Xcel Energy, Inc. has announced plans to construct a 100 mile long 345 kilovolt transmission line in

southwestern Minnesota. An application for a permit for this project is likely in the next few months. Other projects are likely to be identified in a transmission report the utilities will be filing with the Public Utilities Commission on November 1, identifying anticipated transmission system inadequacies and upcoming transmission projects that are anticipated to address those inadequacies.

**Interim Guidance.** It will be necessary for the EQB to respond to any permit applications that are submitted in the next several months. There will be no final rules to apply to these projects because the EQB will not have completed the rulemaking process by then. Having a set of draft rules to apply as interim guidance will prove helpful to project proposers, the general public, and the EQB alike, so each knows what is expected and what process will be followed.

It is perfectly proper for an agency like the Environmental Quality Board to proceed to administer a statutory program like the power plant siting program prior to the time the agency can adopt rules to specifically respond to changes in the law. A project proposer is surely entitled to have a permit application processed without having to wait a year or more for an agency to complete the rulemaking process. In a case involving a Pollution Control Agency permit, the Court of Appeals recognized that an agency can proceed to carry out its permitting duties without first having to adopt rules. In the case entitled *In the Matter of Hibbing Taconite Company*, 431 N.W.2d 885, 894 (Minn. App. 1988), the Court said, “An agency may formulate policy by promulgating rules or by case by case determination. The agency has discretion to decide what method is appropriate in a particular situation.”

What the EQB is doing here is precisely what the Court recognized in the *Hibbing Taconite* case – deciding that what is appropriate in this situation is to process permit applications on a case-by-case basis until final rules can be adopted. The Board is not trying to avoid the rulemaking requirements; we recognize fully that any interim guidance adopted by the Board will not have the force and effect of law. Indeed, the Board is presently pursuing the first steps of the rulemaking process by placing the draft rules on public notice and soliciting public comment on the Board’s intention to adopt rules. If a project proposer or a member of the public should object to any requirement or provision of the guidance, the EQB would have to create a record that supports the particular requirement or provision being challenged.

There is historical precedent for the EQB to adopt interim guidance. In December 1995, shortly after the Wind Siting Act was enacted, the EQB adopted Interim Wind Siting Procedures to apply when considering applications for wind permits. These interim procedures were successfully applied for a period of several years to a number of wind projects.

**The Draft Rules.** The draft rules provide a reasonable and appropriate mechanism for administering the permit program. The draft rules incorporate those parts of the existing rules that are still pertinent to the process. Also, much of what is contained in the draft rules is taken directly from the new statutory language. The draft rules provide for an

extensive evaluation of the environmental and human impacts of any proposed project and provide ample opportunities for the public to participate in the matter.

The draft rules have been available to the electric utility industry, citizen groups, and the general public for several months now. No objections have been registered with the staff. No comments have been filed in response to the notice published in the State Register. The staff does not expect any person or group to object to the Board's adoption of the draft rules as interim guidance.

**Recommendation.** The staff recommends that the Board adopt the draft power plant siting rules as interim guidance for administration of the power plant siting program. The specific action recommended is to adopt the draft rules as interim guidance until such time as the EQB completes the rulemaking process or until the Board shall take further action to revise the draft rules.

**RESOLUTION OF THE  
MINNESOTA ENVIRONMENTAL QUALITY BOARD**

**October 18, 2001**

**Interim Guidance for Administration of Power Plant Siting Program**

**BE IT RESOLVED**, that the MEQB approves and adopts the proposed Findings of Fact, Conclusions, and Order adopting the draft rules amending Minnesota Rules chapter 4400 that are attached hereto as interim guidance for the administration of the permitting program for large electric power generating plants and high voltage transmission lines; and

**BE IT FURTHER RESOLVED** that the Chair of the Board is authorized to sign the Findings of Fact, Conclusions, and Order.